No. 12,509

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS E. HAYES, et al., on Behalf of Himself and All Others Similarly Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD CO. (a corporation) and DINING CAR EMPLOYEES UNION LOCAL 372 (a voluntary unincorporated labor organization); and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Appellees.

BRIEF FOR APPELLANTS.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of dismissal upon the sole ground of lack of jurisdiction made and entered by the Court below on January 19, 1950 (Tr. 136-144, incl.), from a minute order made and entered herein on February 13, 1950, denying the motion to set aside judgment of dismissal and for leave to file

amended complaint (Tr. 163), and from judgment of dismissal made and entered herein on February 13, 1950 (Tr. 164, 165), in a civil suit instituted by appellants against appellee Union Pacific Railroad Co., a corporation (hereinafter referred to as "Railroad"), appellee Dining Car Employees Union Local 372, a voluntary unincorporated labor organization (hereinafter referred to as "Union"), and appellee James G. Barkdoll as District Director of said Local 372 in the District of Los Angeles, State of California, seeking a declaratory judgment that the discriminatory practices set forth in the complaint are illegal and a violation by Union of its responsibilities as sole collective bargaining agent for appellants herein, and by Railroad of its obligation not to benefit by any discriminatory practices against appellants by reason of race or color, acquiesced in or perpetuated by Union; for an order according appellants and each of them such seniority dates in such class or classes or group or groups as they would have been entitled to had there been no discrimination against them by Union and Railroad; for an injunction forever restraining Railroad and Union from engaging in discrimination in the application of seniority rules to appellants, and for damages both compensatory and exemplary, and costs of suit and disbursements, including allowance of a reasonable attorneys' fee.

Jurisdiction of this Court is conferred by 28 U.S.C. § 1291. (Appendix p. i.)

The jurisdiction of the District Court and of this Court are pleaded in paragraph III of the complaint

(Tr. 3) to the effect that jurisdiction is conferred on the District Court by 28 U.S.C. § 1337 (Judicial Code), giving the District Court original jurisdiction of any civil action arising under any act of Congress regulating commerce (Appendix p. i), and by Section 2 of the Railway Labor Act, 45 U.S.C. § 152. (Appendix pp. i-vii.)

STATEMENT OF THE CASE.

The parties to this appeal occupy the same relative positions as they did in the Court below, and hereafter appellants will be referred to as plaintiffs, and appellees as defendants.

The allegations of the complaint may be briefly summarized as follows, but reference should be made to the text of the complaint for better understanding (Tr. 2-17, incl.):

Thomas E. Hayes brought the action on behalf of himself and on behalf of certain persons whose names are set forth in Exhibit A attached to the complaint, all of whom were thereafter collectively referred to as plaintiffs (Complt. I, Tr. 3), and all of whom are members of the Negro race in the employ of defendant Railroad as cooks in the Dining Car Department thereof. (Complt. VI, Tr. 4.)

The statutory basis for jurisdiction of the District Court was alleged (Complt. III, Tr. 3), and defendant Railroad was described as a foreign corporation engaged in interstate commerce and admitted to do business in the State of California; and defendant Dining

Car Employees Local 372 was characterized as a voluntary unincorporated association and labor organization acting as exclusive bargaining agent pursuant to the terms of the Railway Labor Act for plaintiffs and all other employees of Railroad engaged in dining car and commissary service and functioning as such collective bargaining agent in the State of California and within the jurisdiction of the Court. (Complt. IV, Tr. 3-4.)

The members of defendant Union are numerous and are brought before the Court by service upon defendant James G. Barkdoll, District Director for Union of the Los Angeles, California, District. (Complt. V, Tr. 4.)

There was in force at all the times mentioned in the complaint a written collective bargaining agreement executed by Railroad and Union, effective June 1, 1942. (Complt. VII, Tr. 5.)

All of the plaintiffs were in the employ of defendant Railroad when the suit was brought. (Complt. VIII, Tr. 5.) At the time when they were first employed they were, solely because they were Negroes, assigned by Railroad, with the connivance of Union, seniority dates in Group B as defined in Part I, Article IV, Rule 19, of said agreement, and also seniority dates in Class 3 or 4 as second cooks and coach buffet cooks as defined in Part I, Article IV, Rule 20, of said agreement; whereas, white persons when first employed, and solely because they were white, were similarly assigned seniority dates in Group A—standard dining car runs, as defined in

said Rule 19, and in Class 1—chef caterers, or Class 2—chefs, as defined in said Rule 20; and by reason of the discriminatory treatment given to said white employees, their pay and allowances were materially larger than those of plaintiffs, although there was no distinction between the ability and competence of plaintiffs and the white employees. (Complt. IX, Tr. 5, 6.)

Under the terms of said agreement, and particularly Part I, Article IV, Rule 17(c) thereof, it was impossible for plaintiffs to obtain a seniority date and accumulate seniority in a higher class than that to which they were assigned at the inception of their employment relationship, except in accordance with the terms of said Rule 17, which provides that an employee will be accorded a seniority date in a higher group or class in which he has not previously acquired a seniority date only upon assignment by bulletin to a bulletined position or vacancy in such higher group or class and the seniority date so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes, and an employee assigned to a position in a higher group or class will retain the seniority dates held in all lower groups and classes and continue to accumulate seniority therein. Defendant Railroad, in connivance with defendant Union, has at all times within four years preceding the filing of the complaint herein refused to permit plaintiffs to acquire seniority either in Class 1—chef caterers, or Class 2—chefs, as defined in Part I, Article IV, Rule 20, or in Group A—standard dining car runs, as defined in Part I, Article IV, Rule 19, by

refusing to accept from plaintiffs bids for bulletined positions in higher groups and classifications to which they were entitled by reason of seniority, and which bulletined positions were filled, by defendant Railroad in connivance with defendant Union, by white members of defendant Union having lesser seniority than plaintiffs. (Complt. X, Tr. 6, 7.) This allegation is dropped from the first cause of action set forth in the amended complaint for reasons hereinafter stated.

Said agreement provided in Part I, Article V, Rule 26 thereof that promotion shall be based upon seniority, fitness and ability, fitness and ability being sufficient, seniority shall prevail; but with reference to these plaintiffs, defendant Railroad, in connivance with defendant Union, has denied plaintiffs seniority in higher classes and groups while at the same time has employed plaintiffs in such higher classes and groups for long periods of time without any criticism of their fitness and ability, and the reason for the said discrimination against plaintiffs was and is because they are Negroes, and it is and has been the purpose of defendant Railroad and defendant Union to drive plaintiffs and all other Negroes from service in the employment of defendant Railroad in its dining car department, except in inferior groups and classes, and that this policy was devised and has been enforced with express malice against plaintiffs and for the purpose of oppressing them. (Complt. XII, Tr. 8.)

Defendant Union is controlled entirely by persons wholly in sympathy with the said policy of discrimi-

nation and, nothwithstanding repeated protests by plaintiffs and their representatives, defendants Railroad and Union have failed, neglected and refused to refrain from said discriminatory practices. And because all higher administrative bodies to which plaintiffs might take their case are composed of the very people who have perpetuated these discriminatory practices, plaintiffs have no administrative remedy and can obtain no relief except in equity. (Complt. XIII, Tr. 8, 9.)

All the employment records of plaintiffs are in the exclusive possession of defendant Railroad and hence plaintiffs cannot, without access to these records, establish the damages they have suffered within the four years immediately preceding the filing of the complaint. (Complt. XIV, Tr. 9.)

Motions to dismiss were interposed by defendant Union (Tr. 32-37, incl.), and by defendant Railroad (Tr. 38-41, incl.).

Before the hearing on the motions to dismiss took place, several affidavits and counter-affidavits were filed by plaintiffs and defendants raising various issues, none of which was passed upon by the Court below because the order of dismissal was made solely on the ground that the Court had no jurisdiction. We quote from the opinion of the Court below:

> "The question of jurisdiction being decisive, it is not necessary to consider the other motions and respondents' motion to dismiss the action must be granted". (Tr. 143, 144.)

At the hearing on the motions to dismiss, counsel for plaintiffs grounded their right of action upon two cases in the Supreme Court of the United States:

Steele v. Louisville & Nashville RR Co., et al., 323 U.S. 192, 89 L.Ed. 173; and

Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 89 L.Ed. 187;

in both of which cases there was an express, written contract between defendant union, which was the sole collective bargaining agent involved, and defendant railroad, which was the employer, providing in express terms for discriminatory treatment of Negro firemen. (Op'n Tr. 136, at 139.) The District Court, however, held that because there was no discriminatory contract here, but merely a discriminatory practice indulged in by defendant Railroad, with the connivance of defendant Union, there was no jurisdiction because defendant Union had not, as was the situation in the *Steele* and *Tunstall* cases, *supra,* by direct contract, engaged in any discrimination against plaintiffs in violation of its duty and obligation as sole collective bargaining agent.

At the hearing counsel for plaintiffs specifically requested the Court, if its decision on the motions was adverse to plaintiffs, for an opportunity to amend the complaint so as to present the strongest record for presentation to the Court of Appeals, and the Court assured counsel that he would have every facility for the making of the best record which the facts would permit.

Thereafter, counsel for plaintiffs made a motion for leave to file an amended complaint (Tr. 144), to which was attached a copy of the proposed amended complaint verified by Thomas E. Hayes on January 25, 1950, and the motion was amended to make it a motion to set aside the order of dismissal and for leave to file an amended complaint. (Tr. 161, 162.)

On February 13, 1950, the Court made a minute order denying the motion to set aside the dismissal and for leave to file an amended complaint (Tr. 163), which was followed by the entry of a judgment of dismissal on the same day. (Tr. 164, 165.)

It will be noted that the judgment of dismissal purports not only to rule on the question of lack of jurisdiction, but also upon other matters presented by the defendants. But the fact is, as indicated by the Court's opinion (Tr. 136, at 143, 144), to which the Court adhered, that the dismissal was based solely upon a lack of jurisdiction. This was proven by the remark of the Court in that opinion that the question of jurisdiction was decisive. (Op'n Tr. 143, 144.) Because the order went further than the Court's decision, counsel for plaintiffs refused to endorse thereon his approval as to form.

The amended complaint had a dual purpose. It was designed to present the strongest possible pleading consistent with the facts. The substance of the original complaint was realleged as a first cause of action, with some changes necessitated by knowledge gained by counsel subsequent to the filing of the original com-

plaint. The primary change made in the first cause of action of the amended complaint was the omission therefrom of the last sentence of paragraph X of the original complaint (Complt. X, Tr. 7), and the addition to the paragraph of the following language:

> "By reason of the above-described discrimination against Negroes practiced by Railroad, in connivance with Union, plaintiffs have, since their initial employment by Railroad, been unable to build up seniority in seniority groups and classes higher than those in which they were originally given seniority dates, and hence never, as long as they remain in Railroad's employ, will be able to exercise seniority rights in higher groups and classes in competition with white employees." (Am. Complt. X, Tr. 152.)

The original complaint, in said paragraph X (Tr. 6, 7), charged that defendant Railroad refused to permit the plaintiffs to exercise their seniority by declining to accept their bids on bulletined jobs in higher groups and classes than those in which they were originally employed. It developed that several at least of the plaintiffs had at long last and after years of service been finally accorded seniority dates in higher groups and classes. Therefore, the charge that they had been denied the right to exercise their seniority was omitted from the first cause of action of the amended complaint.

The second cause of action set forth in the amended complaint was designed to meet the Court's position that the collective bargaining agent, defendant Union, had not violated its duties as such by entering into a

written contract with defendant Railroad discriminatory against plaintiffs in express terms.

It has always been the opinion of counsel that the decision of the District Court was wrong, and that the original complaint stated facts bringing the case within the jurisdiction of the District Court. But, out of abundant caution, plaintiffs attempted to bring the case within the Court's ruling by charging that there was contractual action on the part of the collective bargaining agent, defendant Union, in violation of its duties as such.

The second cause of action follows very closely the pattern of the first cause of action, with this important distinction:

It alleges the same discrimination against Negroes at the time they were initially employed by defendant Railroad by assigning to them, arbitrarily, seniority dates in lower groups and classes than those automatically assigned to white cooks when they were first employed. (Am. Complt. Second Cause of Action II, Tr. 154, 155.)

Then it is alleged that the existing agreement, that is, the collective bargaining agreement of June 1, 1942, did not provide any standard or yardstick by which it could be determined in which of the several groups and classes new employees should be given seniority dates, but that the agreement was negotiated in the light of the existing discriminatory practices, and that during the said negotiations and after the effective date of the agreement, defendants Railroad and Union adopted, by verbal agreement and understand-

ing, as the method of determining seniority dates in the several groups and classes, the existing discriminatory practices and so perpetuated the same against the Negro employees of defendant Railroad, including plaintiffs. And that, as thus modified, the entire contract was, and has been ever since its effective date, and now is, discriminatory against Negroes in the employ of defendant Railroad and its dining car department. (Am. Complt. Second Cause of Action II, Tr. 155, 156.)

In other words, the distinction between the original complaint and the amended complaint is, first, that there is eliminated from the first cause of action in the amended complaint the charge that the Negro plaintiffs were not permitted to exercise their seniority rights in the higher groups and classes; and, second, in the second cause of action, that the discrimination complained of was perpetuated by agreement between defendants Railroad and Union to recognize the existing discriminatory practices as the yardstick or rule by which seniority dates in groups and classes would be assigned when men were first employed. That is, that Negroes should automatically and regardless of any consideration other than their race, be assigned seniority dates in lower groups and classes than those in which white employees, when first employed, received seniority dates.

The gist of the discriminatory practice is that, no matter how long a Negro employee remains in the service of defendant Railroad he never, under any circumstances, can build up seniority in higher groups

and classes against white persons already employed in these higher groups and classes. So that the initial discrimination against the Negro at the time of his employment, and made solely because he is a Negro, follows him to his detriment as long as he remains in railroad service.

QUESTIONS INVOLVED.

I.

Has a labor organization power under the Railway Labor Act to make a collective bargaining contract with a railroad, which contract was negotiated in the light of, and perpetuated, a discriminatory employment practice, solely because of race, against Negro employees represented by it?

II.

Has such a labor organization power, under the Act, to perpetuate, through the means of a collective bargaining agreement, an employment practice by the railroad which discriminates against the Negro employees represented by it, solely because of race?

III.

Has such a labor organization power under the Act to make a collective bargaining agreement which it knows will be applied and interpreted by the railroad to discriminate against Nego employees represented by such labor organization, solely because of race, and which was designed to perpetuate such discrimination?

SPECIFICATION OF ERRORS.

1. The Court erred in dismissing the original complaint on the ground of lack of jurisdiction in the Court to hear and determine the issues pleaded in the complaint.

2. The Court erred in holding that an express contract between Union and Railroad calling for discriminatory practices against the appellants, solely because they are Negroes, was necessary to establish jurisdiction.

3. The Court erred in holding that the discriminatory practices against appellants, solely because they are Negroes, established by Railroad and concurred in by Union, were not sufficient to give the Court jurisdiction.

4. The Court erred in holding that, unless Union actually contracted with Railroad for the application by Railroad of discriminatory practices against appellants solely because they are Negroes, Union did not violate any of its duties to appellants as their sole collective bargaining agent.

5. The Court erred in failing to set aside its order of dismissal, dated January 19, 1950, and permit the filing of the amended complaint.

SUMMARY OF ARGUMENT.

1. The power of Union to act as exclusive bargaining representative of appellants is derived from the Railway Labor Act, and the fair interpretation of the statutory language is, that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.

Steele v. Louisville & Nashville R.R. Co., et al., 323 U.S. 192, 89 L. Ed. 173.

2. Discriminations based on race alone are obviously irrelevant and invidious, and Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.

Steele v. Louisville & Nashville R.R. Co., et al., supra.

3. Discrimination is pleaded in this case in that Union, in effect, agreed with Railroad that Negroes, solely because they were Negroes, should when initially employed be given seniority dates in lower seniority groups and classes than those in which white cooks, when initially employed, were given seniority dates.

Steele v. Louisville & Nashville R.R. Co., et al., supra.

4. The collective bargaining process extends far beyond the mere negotiation and execution of a formal written document between Union and Railroad, and includes every device, subterfuge and express or implied agreement or recognition of an existing prac-

tice which results in discrimination purely on racial grounds against any members of the craft represented by Union.

Steele v. Louisville & Nashville R.R. Co., et al., supra;

Graham v. Brotherhood of L. F. & E., 94 L. Ed. Adv. Op. 1 (October Term, 1949).

5. The representative which thus discriminates may be enjoined from so doing and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract, express or implied, which the bargaining representative is prohibited from making.

Steele v. Louisville & Nashville R.R. Co., et al., supra.

6. The original complaint disclosed a case of racial discrimination by joint action of Railroad and Union which was within the jurisdiction of the District Court.

Steele v. Louisville & Nashville R.R. Co., et al., supra.

7. The amended complaint reiterates, in the first cause of action, the substance of the original complaint, and in the second cause of action sets forth distinct, contractual action on the part of Union and Railroad in the execution of a collective bargaining agreement, non-discriminatory upon its face, but which Union knew, when the same was negotiated and executed, would be interpreted in the light of the

existing discriminatory practice, to the prejudice of the Negro cook appellants in this case.

Steele v. Louisville & Nashville R.R. Co., et al., supra.

ARGUMENT.

I.

THE NATIONAL RAILWAY LABOR ACT, AS CONSTRUED BY THE SUPREME COURT, PROHIBITS THE SOLE COLLECTIVE BARGAINING AGENT, ACTING AS SUCH BY VIRTUE OF THE ACT, FROM DISCRIMINATING AGAINST ANY EMPLOYEES REPRESENTED BY IT SOLELY ON THE GROUND THAT THEY ARE NEGROES.

Under this heading and the second one, we shall discuss the first, second, third and fourth Specifications of Error.

The question involved in this case first came before the Supreme Court in the case of:

Steele v. Louisville & Nashville R. R. Co., et al., 323 U.S. 192, 89 L.Ed. 173;

and the companion case of:

Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 89 L.Ed. 187.

The facts in both cases were substantially the same. The Union, as sole collective bargaining agent for all firemen and enginemen, entered into a written contract with the Railroad which provided, in substance, for the destruction of seniority already earned by Negro firemen and their gradual elimination from railroad employment. The Negro firemen were, by the

union's constitution, denied membership in the organization; whereas, in the case at bar, Negro cooks are freely accepted as members of Union. But nothing turns on this distinction.

In the very first paragraph of the opinion of the Court in the *Steele* case, delivered by Mr. Chief Justice Stone, the Court said:

> "The question is whether the Railway Labor Act imposes on a labor organization acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees the duty to represent all the employees in the craft without discrimination because of their race and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." (323 U.S. 193, 194; 89 L.Ed. at 178.)

The very phraseology which was used to frame the question shows that the obligation of such a labor union is to represent all the employees in the craft without discrimination because of their race.

The precise issues raised by the case at bar were not involved in either the *Steele* or the *Tunstall* cases, for in both cases there was a flagrant, arrogant and arbitrary contract calling for discrimination, in the making of which the collective bargaining agent participated. But it is submitted that the principle established in these cases is not dependent upon an express, written, formal contract between Railroad and Union, but is applicable to a situation where the discriminatory practice is the result of passive acceptance by Union of the discrimination engaged in by

Railroad, and its perpetuation grows out of the collective bargaining process.

Suppose, for example, that there had been no formal written agreement between railroad and union in the *Steele* and *Tunstall* cases discriminatory against Negro firemen purely because of their race. But, on the contrary, that the railroad had announced the self-same policy of discrimination embodied in the contract, and the union had tacitly let it be known that it would not lift a finger to protect the employees it represented but, on the contrary, would acquiesce and concur in the establishment of the discriminatory practice by the railroad. Can it be said that the decision in the *Steele* and *Tunstall* cases would, under these circumstances, have been different, and that the Negro firemen would have been left without redress because the Court had no jurisdiction?

Is not the breach of duty postulated in the opening sentence of the opinion and cast upon the collective bargaining agent by virtue of the terms of the Railway Labor Act, as gross in the one case as it is in the other?

Is not the same obligation imposed upon the collective bargaining agent in the case of an implied or tacit agreement, as well as in the case of a formal written instrument?

Can Union and Railroad accomplish by indirection that which they are prohibited from doing directly?

Is the bargaining power of the sole collective bargaining representative exhausted by the drawing up

and executing of a formal agreement with the Railroad so that, as long as the agreement is not in terms discriminatory, it may be interpreted by common consent of the parties in a manner highly discriminatory?

Further along in the opinion in the *Steele* case, we find this significant language:

> "But we think that Congress in enacting the Railway Labor Act and authorizing a labor union chosen by a majority of a craft to represent the craft did not intend to confer plenary power upon the union to sacrifice for the benefit of its members rights of the minority of the craft without imposing on it any duty to protect the minority". (323 U.S. at 199; 89 L.Ed. at 181.)

After pointing out that the purposes of the Act declared by Section 2, are the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein", and that this aim is sought to be achieved by encouraging "the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions", the Court said:

> "These purposes would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table. And if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority, the only recourse of the minority would be to strike with the attendant interruption of commerce which the Act seeks to avoid." (323 U.S. at 200, 89 L.Ed. at 182.)

The ultimate rule established by the *Steele* and *Tunstall* cases is expressed in the following language of the Court:

> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable with those possessed by a legislative body, both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co. v. National Labor Relations Board, supra* (321 U.S. 335, 88 L.Ed. 766, 64 S.Ct. 566), but it has also imposed upon the representative its corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the *aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to fairly exercise the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them.*" (323 U.S. at 202, 89 L.Ed. at 183.) (Italics supplied.)

It follows, we submit, that the collective bargaining agent is, when it makes with the Railroad a collective bargaining contract which was negotiated in the light of, and perpetuated, a discriminatory employment practice solely because of race, just as guilty of a violation of its duty as the Union was in the *Steele* and *Tunstall* cases.

No labor organization should have power under the Act to perpetuate, through the means of a collective bargaining agreement, an employment practice by Railroad which discriminates against the Negro employees solely because of race.

Nor should a collective bargaining agent, under the Act, have power to make a collective bargaining agreement which it knows will be applied and interpreted by the railroad to discriminate against Negro employees represented by such labor organization solely because of race and which was designed to perpetuate such discrimination.

If, therefore, there is discrimination in the case at bar against the appellants solely because they are Negroes, practiced by Railroad and acquiesced in by Union, and the contract actually made, though nondiscriminatory on its face, is nevertheless intended by both parties to it, namely, Railroad and Union, to perpetuate through the contract an existing discriminatory employment practice, we submit that the District Court did have jurisdiction just as clearly as it did in the *Steele* and *Tunstall* cases.

II.

THERE IS ACTUAL DISCRIMINATION AGAINST APPELLANTS, SOLELY BECAUSE THEY ARE NEGROES, AS A RESULT OF THE JOINT ACTION BY UNION AND RAILROAD.

Thus far we have assumed that there was discrimination against the appellants by the joint action of Railroad and Union, and that that discrimination was

predicated exclusively upon the fact that appellants are Negroes. It now remains to examine the allegations of the pleadings and to demonstrate what the discrimination was and how it affects appellants.

It is alleged in the complaint and amended complaint (Tr. 155), that the collective bargaining agreement executed by Railroad and by Union, as collective bargaining agent for all the employees in the dining car service of Railroad, set up various seniority groups and classes, but did not, by its terms, provide any method for determining, at the inception of the employment relationship, to which group or class any particular applicant for employment should be assigned. If, in making the assignment, Railroad and Union had applied standards, for example, of fitness, ability, past experience or the lack thereof equally to appellants and white cooks alike, the contract would not, either on its face, or in practical operation, be discriminatory. There was, however, as is alleged in the complaint (Complt. IX, Tr. 5, 6), and amended complaint (Am. Complt. II, Tr. 154-157, incl.), a practice of long standing which did furnish a yardstick for determining the group or class to which new employees would be assigned when first employed. That practice was that, automatically, all white employees would be assigned to Group A and Class 1 or 2; whereas, all Negroes when first employed would be assigned to Group B and Classes 3 or 4, simply because they were Negroes. And the practice arose and was perpetuated as a result of tacit agreement between Railroad and Union.

When we say "assigned", we mean that the respective employees would be given seniority dates, from which their seniority would accumulate, in the group and class to which they were initially assigned.

Let us see how this discrimination affects the individual appellant throughout his period of railroad employment. But first it must be understood, and is so alleged in the complaint (Complt. IX, Tr. 5, 6), and amended complaint (Am. Complt. II, Tr. 155), that the emoluments of assignments in Group B and Classes 3 and 4 are materially less than the emoluments of those assigned to Group A and Classes 1 and 2.

This discrimination practiced against the Negro at the time of his first employment has serious consequences which affect him throughout the term of his railroad service, and the reason is the peculiar method by which seniority is exercised.

The collective bargaining agreement provides, and it is so alleged in the complaint and amended complaint (Tr. 6, 151, 157), that seniority in any higher group or class than that to which the employee was assigned at the time of his initial employment, can be acquired only through the process known as bulletin bid and assignment.

The contract provides that new positions and vacancies shall be bulletined—that means that the specifications of a new position or vacancy in a higher group or class will be posted on a bulletin board and, within a limited number of days, employees in lower groups and classes will be permitted to bid for the

bulletined position. If the bidding employee is considered as having sufficient fitness and ability, seniority shall prevail.

Notwithstanding the welter of affidavits filed in the case at bar and included, upon the demand of Railroad and Union, in the transcript of record, *the fact remains undisputed that every one of the appellant Negro cooks, when first employed by Railroad in its dining car service as a cook, was arbitrarily given a seniority date in Group B and in Classes 3 or 4; whereas, at the same time, white applicants for cooks' jobs were automatically assigned seniority dates in Group A and in Classes 1 or 2. Fitness and ability had nothing to do with these assignments.* No matter how skilled and experienced the Negro might be, because he was a Negro, he went into Group B and Classes 3 or 4. On the other hand, no matter how lacking in skill and experience the white applicant might be, he was automatically assigned, because he was white, to Group A and Classes 1 or 2.

Furthermore, it is alleged (Tr. 8, 153 and, by incorporation by reference, 158), and not denied in any affidavit in the transcript of record, that all of the Negro cooks had fitness and ability. They had been in the employ of the Railroad for several years, and the fact of their continued employment was in itself a sufficient demonstration of fitness and ability.

In order to see how the initial discrimination at the time of original hiring operates to the disadvantage of the Negro cooks, let us examine the practical consequences of the discrimination:

Suppose a new job is bulletined, the specifications of which are that it is a Class A run requiring employees in Group 1 or 2—chef caterer or chef. If the Negro cook bids he has absolutely no seniority in Group A or Class 1 or 2, because his seniority, determined at his initial hiring, is limited to Group B or lower, and Class 3 or 4 or lower. Hence, any white cook with initially-determined seniority dates in Group A, Class 1 or 2 is, no matter when hired, bound by the very nature of the case to have more seniority for the newly-bulletined job than the Negro applicant who has never had a chance to build up seniority in the specifications of this job. Under the contract, the new position must go to the white cook because assignment will be made on the basis of seniority.

The result is that, even though the Negro cook has years of seniority in Group B, he cannot compete with any white cook for the position, even though that white cook was employed as recently as four months prior to the posting of the bulletin for the new position.

And this handicap in exercising seniority in higher groups and classes on new bulletined jobs or vacancies will follow the Negro cook as long as he remains in the railroad service. So, if the Negro gets the new job by having his bid accepted and being assigned to the job, he is able to do so only because no white cook wants the job, and can later be displaced or "bumped" by any white cook having greater seniority in Group A.

We submit, therefore, that we have established, on the face of the pleadings, a highly discriminatory practice applicable to Negroes only, and solely because they are Negroes.

III.

THE DISTRICT COURT HAD JURISDICTION OF THIS CAUSE AND THE POWER TO RELIEVE THE APPELLANTS FROM THE CONSEQUENCES OF THE DISCRIMINATORY EMPLOYMENT PRACTICES TO WHICH THEY WERE SUBJECT AND PERMANENTLY TO ENJOIN ALL SUCH PRACTICES IN THE FUTURE.

In the *Steele* case, *supra,* the Court said:

> "The representative which thus discriminates may be enjoined from so doing and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' * * * *Jackson County v. United States,* 308 U.S. 343, 84 L.Ed. 313, 60 S.Ct. 285; *Sola Electric Co. v. Jefferson Electric Co.,* 317 U.S. 173, 176, 177,

87 L.Ed. 165, 168, 169, 63 S.Ct. 172; cf. *Clearfield Trust Co. v. United States,* 318 U.S. 363, 87 L.Ed. 838, 63 S.Ct. 573.

"So long as a labor union assumes to act as the statutory representative of a craft it cannot rightfully refuse to perform the duty which is inseparable from the power of representation which is conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent nonunion or minority union members of the craft without hostile discrimination, fairly, impartially and in good faith. Wherever necessary to that end, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action." (323 U.S. 203, 204, 89 L.Ed. at 184.)

In connection with the last sentence quoted above, it is significant that it is alleged that Union is controlled by persons wholly in sympathy with the said policy of discrimination against plaintiffs and, notwithstanding repeated protests by appellants and their representatives, Railroad and Union have failed, neglected and refused to refrain from such discriminatory practices. (Complt. XIII, Tr. 8; Am. Complt.: First Cause of Action XIII, Tr. 153; Second Cause of Action III, incorporated by reference, Tr. 154.)

The truth of the matter is that the discriminatory practices complained of cannot exist except for the tacit or implied agreement between Railroad and Union that it shall exist. The purpose of the discrimination is equally clear. It is the same purpose found in the *Steele* and *Tunstall* cases, *supra*—the desire to drive Negroes out of railroad employment or relegate them to inferior jobs—a purpose which this Court cannot sanction.

The principle involved is admirably expressed by the late Mr. Justice Murphy in his concurring opinion in the *Steele* case, and we quote:

> "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation." (323 U.S. at 209, 89 L.Ed. at 187.)

IV.

THE DISTRICT COURT SHOULD HAVE VACATED ITS ORDER OF DISMISSAL OF JANUARY 19, 1950, AND PERMITTED THE FILING OF THE PROPOSED AMENDED COMPLAINT.

Under this heading we shall discuss the fifth Specification of Error.

The District Court's opinion (Tr. 136) to the effect that the case at bar is distinguishable from the *Steele*

(323 U.S. 192, 89 L.Ed. 173) and *Tunstall* (323 U.S. 210, 89 L.Ed. 187) cases, in that there is lacking in the original complaint any allegation of a written contract between Railroad and Union which on its face is discriminatory against appellants, whereas in the two cases just cited there was such a contract, ignores the realities of collective bargaining. The District Court held, in effect, that as long as the discriminatory practices are not expressed in any written contract made by Railroad and Union, there is no breach of its duty by Union, even though the practices are perpetrated with its tacit approval.

It is true that in the original complaint the participation by Union was expressed by the term "connivance". It is true that the District Court said that the word "connivance" cannot, without severe strain, be taken to mean "participation through contracting". (Tr. 142.) In this, however, we think that the District Court erred. Surely, Congress did not intend by the Railway Labor Act to empower the collective bargaining representative to discriminate against any of the employees it represented as long as this discrimination was not expressed in the terms of a specific written agreement between the collective bargaining representative and the employer. Such a construction would put a premium upon subterfuge and would, in effect, nullify the principle established by the *Steele* and *Tunstall* cases, *supra*.

The District Court also said in its opinion that "simply stated, the complaint alleges only that the Union has permitted, through failure to prevent, the

existence of the alleged discriminatory practices of the Railroad". (Tr. 142.) Even the definition of "connivance", cited in the opinion taken from *Branden v. Holman,* 41 F. (2d) 586, 588, does not bear out the conclusion reached by the District Court. That definition is:

> "Connivance with others may be committed by *passive permission* or failure to prevent, of helping by not hindering when it is one's duty to prevent, or by negligence, or by voluntary oversight." (Tr. 142.) (Italics supplied.)

Again we submit that the Congress never intended to empower the collective bargaining representative to perpetuate discriminatory practices against any of the people it represents through "passive permission". "Passive permission" certainly partakes of the character of collective bargaining, and if the evils complained of in the original complaint were the result of affirmative action on the part of the Railroad, with the passive permission of Union, there was clearly a breach of the duty cast upon the Union by the Railway Labor Act not to exercise its powers in such manner as to discriminate against any of the employees represented by it, solely and exclusively because of race.

Nevertheless, rather than take an immediate appeal from the order dismissing the original complaint, it seemed wiser to re-cast the allegations of the original complaint so as to allege that the discriminatory practice complained of was perpetuated through contractual action on the part of Union. Accordingly, the original complaint, with the exceptions already noted,

was set forth in the first cause of action of the amended complaint. And in the second cause of action contractual action by Union, as a part and parcel of the collective bargaining process, was alleged. This was done so as to give the District Court an opportunity to reconsider its ruling in the light of the rephrased amended complaint.

For the convenience of the Court, we are setting forth the essential allegations of the second cause of action of the amended complaint which contain the new matter not incorporated specifically in the original complaint or in the first cause of action in the amended complaint.

"II

> Prior, however, to the effective date of the said agreement, defendants Railroad and Union had, by mutual understanding and verbal agreement, conspired together to discriminate against Negro employees in the dining car department of Railroad by arbitrarily assigning to Negroes, when first employed by Railroad, seniority dates in Group B, as defined in Part I, Article IV, Rule 19, of said Agreement, and in Classes 4 and 5, as defined in Part I, Article IV, Rule 20 of said Agreement, whereas white persons when first employed were arbitrarily assigned seniority dates in Group A as defined in said Rule 19, and in Classes 2 and 3, as defined in said Rule 20; and by reason of the discrimination thus practiced by Railroad and Union against Negroes and in favor of white persons, the pay and allowances of the latter were materially larger than the pay and allowances of the former, although the Negroes were no less competent, able and experienced than

the white persons. The basis for the said discrimination against the Negroes was solely because of their race.

The said Agreement did not provide any standard or yardstick by which it could be determined in which of the several seniority groups and classes new employees should be given seniority dates. But the said agreement was negotiated in the light of the existing practice, and the existing practice was, by Railroad and Union during said negotiations and after the effective date of the Agreement, adopted by verbal agreement and understanding between Railroad and Union, as the method of determining seniority dates in the several groups and classes defined in said Rules 19 and 20; and by this adoption by Railroad and Union, the said Agreement was modified in violation of the Railway Labor Act and for the purpose of discriminating against Negro employees in the dining car department of Railroad; and thus modified, the entire contract was, has been ever since its effective date, and now is, discriminatory against Negroes in the employ of defendant Railroad in its dining car department.

That the whole purpose of incorporating in the said Agreement Rules 19 and 20, was to give recognition to the said discriminatory practice which had previously existed prior to the effective date of said Agreement, and that the said Agreement was negotiated and entered into by Railroad and Union for the express purpose of perpetuating the said discriminatory practice and using the same as the standard or yardstick for the determination in which of the several seniority groups and classes new employees should be given seniority dates.

That in accordance with the said discriminatory agreement, plaintiffs at the time they established their employment relationship, were by Railroad, and pursuant to said Agreement with Union, assigned to that certain seniority group known as B, as defined in said Rule 19, whereas white persons were at the time when they established an employment relationship, assigned by Railroad pursuant to said Agreement, to seniority Group A, as defined in said Rule 19.

Moreover, plaintiffs at the time they established their employment relationship, were by Railroad, pursuant to said Agreement with Union, assigned to the fourth and fifth seniority classes, as defined in said Rule 20, whereas white persons in the dining car service of Railroad were at the time their employment relationship was created, assigned by Railroad, pursuant to said Agreement with Union, either as Class 2 or Class 3 employees, as defined in said Rule 20; and by reason of the said discriminatory treatment, and in accordance with the said discriminatory Agreement, the pay and allowances of white persons were materially larger than the pay and allowances of plaintiffs, although there was no distinction between the ability and competence of plaintiffs and said white persons.

"III

Under the terms of said Agreement, and particularly Part I, Article IV, Rule 17, subdivision (c), it was impossible for plaintiffs to obtain a seniority date and accumulate the seniority in a higher class than that to which they were assigned at the inception of their employment relationship, except in accordance with the terms of

said Rule 17, which provides that an employee will be accorded a seniority date in a higher group or class in which he has not previously acquired a seniority date only upon assignment by bulletin to a bulletined position or vacancy in such higher group or class and the seniority date so accorded will be the date of assignment and will also be accorded in all intermediate groups and classes, and an employee assigned to a position in a lower group or class will retain the seniority dates held in all lower groups and classes and continue to accumulate seniority therein.

However, plaintiffs have been and always will be as long as they remain in the employ of Railroad, at a serious disadvantage in competition with white persons because they, as a result of the discriminatory Agreement, will be unable to compete with white employees in the dining car service of Railroad and build up seniority in higher seniority groups and classes than those to which they were initially assigned; whereas white persons employed initially in higher groups and classes, will from the very day of their first employment, begin to build up seniority in such higher groups and classes to such an extent that the Negro employees have not been, are not, and will never be able to compete with the said white employees with respect to bulletined positions in the higher seniority groups and classes." (Tr. 154-158, incl.)

The theory of the second cause of action is that the collective bargaining agreement was negotiated in the light of an existing discriminatory practice; that the agreement itself did not provide any standard for the classification of new employees at the time

they were initially employed with respect to seniority dates; and that the absence of a standard was supplied by the existing discriminatory practice. In other words, the contract was left purposely without any standard of application of seniority dates in particular groups and classes so that the existing discriminatory practice could be continued and serve as the rule by which seniority dates in the various groups and classes would be assigned upon initial employment of new employees in a manner highly discriminatory against the appellants.

It is our contention that, under these circumstances, the contract itself, although not discriminatory on its face, became discriminatory as a result of contractual or consentual action between Railroad and Union. The interpretation of a contract agreed upon between the parties is certainly a part of the collective bargaining process. And there is no doubt that Union and Railroad negotiated and executed the collective bargaining agreement with the full knowledge that it did not contain any standard providing for the assignment, upon initial employment, of new employees to any specific seniority group or class, but that the lack of a standard would be supplied by an adoption of the existing discriminatory practice.

In the case of *Graham v. Brotherhood of L. F. & E.,* decided at the October Term 1949 (94 L.Ed. Adv. Op. 1), in which the Court said that the issues in the *Graham* case were substantially indistinguishable from the *Steele* (323 U.S. 192, 89 L.Ed. 173) and *Tunstall* (323 U.S. 210, 89 L.Ed. 187) cases, the Court itself

construed its holding in these two older cases. In the opinion of the Court, by Mrs. Justice Jackson, the following language appears with reference to the *Steele* and *Tunstall* cases:

> "* * * We pointed out that the statute which grants the majority exclusive representation for collective bargaining purposes strips minorities within the craft of all power of self-protection, for neither as crafts nor as individuals can they enter into bargaining with employers on their own behalf. * * * And we held that the abuse of its powers by perpetrating discriminatory employment practices based on racial consideration gives rise to a cause of action under federal law which federal courts will entertain and will remedy by injunction." (at p. 5.)

The abuse of power referred to in the above quotation is abuse by a sole collective bargaining representative. Thus, the Supreme Court itself, in construing the *Steele* and *Tunstall* cases, has said that discriminatory practices based upon racial considerations are forbidden just as much as discrimination founded upon a contract in writing between the collective bargaining representative and the Railroad.

CONCLUSION.

It is submitted that both the original complaint and the proposed amended complaint set forth in clear and unmistakable terms a discriminatory practice by the concurrent action of Railroad and Union, and that this action by Union is a violation of the grant

of authority conferred upon it as sole collective bargaining representative of appellants by the Railway Labor Act. If this be true, it follows that a cause of action is stated within the jurisdiction of the District Court and of this Court, and that the orders of dismissal for lack of jurisdiction should be reversed and that the cause should be remanded to the District Court for further proceedings in accordance with the opinion of this Court.

Dated, San Francisco, California,
June 16, 1950.

Respectfully submitted,
HAROLD M. SAWYER,
Solicitor for Appellants.

ARCHIBALD BROMSEN,
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Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

JURISDICTION.

28 U.S.C. § 1291 reads as follows:

"§ 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. § 1337 (Judicial Code) reads as follows:

"§ 1337. *Commerce and anti-trust regulations*

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Railway Labor Act, § 2; 45 U.S.C. § 152, reads as follows:

"§ 152. *General duties—Duty of carriers and employees to settle disputes*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier

growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through repre-

sentatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* that nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or

not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working

conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify

the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Violations; prosecution and penalties

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or

agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186."